

The Attorney-General's department is currently considering proposed changes to the rules governing property settlement in divorce. This is a highly contentious area of the Family Law Act, and in this essay Peter Saunders sets out to show why. There are, he says, different and competing criteria of 'fairness' in our culture, and some of the ideas now under consideration privilege just one notion of fairness while neglecting others that are equally valid.

This article is a personal contribution to the debate over divorce law reform. It does not represent the 'official' position of the Australian Institute of Family Studies, nor is it linked to the Institute's ongoing work on the Australian Divorce Transitions Project.

What is a fair divorce settlement?



Peter Saunders

Australians believe in giving everybody 'a fair go'. It is one of the defining values of Australian culture. 'Fairness' is to Australians what motherhood and apple pie are to Americans. It is something that everybody believes in.

But what does it mean? We might all believe in giving people a fair go, but push us to explain what we mean by this and the cracks of disagreement and dissent rapidly start to appear.

In this article, I shall set out three very different conceptions of fairness. All three make sense; indeed, most of us have probably endorsed all three in different situations in our lives. But all three pull in different directions and it can be extremely difficult to satisfy them all in any one situation.

I have discussed these three notions of fairness elsewhere in relation to arguments about inequality in society as a whole (see Saunders 1996, chapter 9), but they are in principle relevant to any analysis concerning the fair distribution of income and property between people. Here, I shall relate them to the question of how property may be divided fairly between husbands and wives following a divorce.

My arguments are limited to the narrow issue of property settlements, because this is the area of the Family Law Act currently under consideration by the Attorney-General as a possible target for reform. I shall have nothing to say about other areas of the divorce law, such as provisions for child custody and maintenance, although these are obviously crucially important.

We shall see that a commitment to 'fairness' could result in several different outcomes when applied to property settlements after divorce. People often assume that 'fairness' is the same thing as 'equality of outcomes', but enforcing equal outcomes can sometimes seem very unfair, and the fairest outcomes may not always be consistent with an equal share-out.

What is fair?

Let us begin by considering the three very different criteria according to which a distribution of income or property might be considered 'fair'.

Three players sit down to enjoy a game of *Monopoly*. The first is an egalitarian who believes that fairness in society is tantamount to ensuring roughly equal outcomes. The second is a meritocrat who believes that virtue (individual merit) is the sole basis on which people should be rewarded in society. The third is an old-style liberal who believes that any social outcome is fair provided everybody is free to choose their course of action and nobody breaches the consensually agreed rules governing their common behaviour.

The game commences and within just a few short minutes, a bitter argument erupts.

The egalitarian complains that, although the money and property was all equally distributed at the start of the game – an arrangement which everybody initially agreed was fair – it is now unequally distributed. One person owns Mayfair, one owns Old Kent Road, and one owns nothing at all and is having to pay rents to the other two. If an equal distribution at the start of the game was fair, then surely this new, unequal distribution

must be unfair. The egalitarian demands that everything be shared out afresh.

The meritocrat, too, is unhappy, but for different reasons. The meritocrat has no problem with the principle of unequal shares provided the distribution of income and property reflects the skill and dedication displayed during the game by each of the players. In a game of Monopoly, however, this is not the case – one person rolls a two and ends up in jail; another rolls eleven and ends up buying Mayfair. Completely different outcomes dependent almost entirely on luck rather than judgement – surely this cannot be fair? The meritocrat demands that the game continue without dice and that properties be allocated according to the merit which each player displays during the game.

Only the liberal is happy. For the old-style liberal, the final distribution of money and property is of no consequence. Provided nobody has cheated and, in particular, that nobody has coerced anybody else, then the result is fair. If one person ends up with an hotel on Mayfair and another ends up bankrupt, so be it – they all played by the rules and the outcome is therefore just. Indeed, any attempt to remove the hotel, or to bale out the bankrupt using the other players' money, would be unfair, for everybody came by their holdings legitimately and all are therefore entitled to keep what they have.

The three principles of fairness

The principle of fairness to which the egalitarian player appeals corresponds to what moral philosophers call a '*distributive theory of justice*'. In this theory, a just outcome is judged basically by the equality of the final share-out. The outcome of the Monopoly game is unjust because one player ends up with all the property and the others end up with none. This fact alone is sufficient to deem the game unfair.

The best-known advocate of this sort of position is John Rawls. Rawls argues that a fair distribution of resources is the one with which everybody would agree if they had to devise a property system without knowing what position they would occupy in this system. Rather like the players at the start of a game of Monopoly, Rawls argues that people in this 'original position', operating behind a 'veil of ignorance', would agree on an equal share out as the fairest distribution of resources. The only modification to this principle to which they would all agree is that unequal outcomes would be acceptable if it could be shown that the poorest people in the distribution benefited from the existence of such inequalities. Rawls calls this 'the difference principle'. The fact that equality (modified as appropriate by the difference principle) is the one pattern of distribution on which we would all agree from within the original position is the proof of its moral superiority.

The principle of fairness to which the old-style liberal appeals is very different. It is based on what moral philosophers call an '*entitlement theory of justice*'. Seen from this perspective, a just outcome is one in which people end up with that to which they have previously established title.

One of the most influential modern philosophers arguing from this position is Robert Nozick. He takes issue with Rawls on the grounds that resources are not simply lying around waiting to be distributed, but are brought into the world with entitlements already attached to them. Before we ask to whom we should allocate resources, we should first ask to whom they already belong. Nozick argues that people establish entitlement through their labour, or through voluntary transfer from others holding title. Far from being fair and just, Rawls's position is manifestly unfair, for it would take away resources from those who have come by them legitimately. Provided no coercion is involved, the final distribution of resources which results from people working and freely exchanging the products of their labour must be deemed fair, irrespective of what this distribution looks like. Indeed, it would be extremely unfair to strip resources from one person and give them to another when both had been following the agreed rules. Whether through luck or judgement (and, as in a game of *Monopoly*, it is often a bit of both), some people come out ahead of others, but in the absence of coercion or cheating, there is nothing 'illegitimate' about this outcome. Those who 'win' are entitled to do so, and their just entitlements cannot justly be stripped from them and reallocated to others.

Finally, the principle of justice to which the meritocrat appeals is one grounded in '*just deserts*'. This principle holds that a just outcome can only be judged according to the merit attaching to the behaviour of the parties involved.

This principle, of course, begs the question of what is meritorious or virtuous. The answer will vary somewhat according to context. Michael Young, who first coined the term 'meritocracy' over 40 years ago, defined merit as 'ability plus effort', but he was referring in this context to the virtues deemed important in a modern, competitive economy where people are employed and rewarded for their talents and their hard work. In other contexts, however, merit can clearly mean other things – individual merit might be grounded in virtues like honesty or fidelity as much as in diligence and ability. No matter how 'merit' is defined, however, the principle of just deserts holds that rewards should be allocated to those who are morally deserving according to some previously agreed set of criteria of approved and desired behaviour.

In sum, fairness can be measured (1) by equality of outcomes, (2) by demonstration of entitlement, or (3) by reward to virtue. None of these principles is self-evidently right or wrong or even better or worse than any other. They are different dimensions of fairness and, although they are in many respects incompatible, all three are deeply embedded within western cultures as reasonable criteria to which we may appeal.

Fairness in divorce

One area where we see these three principles of fairness competing and clashing with each other is in property settlements following divorce. The Family Court is expected to adjudicate between estranged husbands and wives in a 'fair' manner, and nobody would argue with

that as an objective. However, in Australia it is clear that some people (women as well as men) have been feeling increasingly aggrieved by what they see as a systematic bias and unfairness in the Court's judgements (see Kaye and Tolmie, 1998, for a rather one-sided review of such grievances). Both men and women want a 'fair go', but they often seem to find it hard to agree on what fair treatment actually entails.

One reason why there is so much disagreement over the fairness of property settlements is that different parties are appealing to different conceptions of fairness. These competing conceptions can best be illustrated by means of three fictitious scenarios.

In each of these scenarios, the two parties to the divorce are referred to simply as 'spouse A' and 'spouse B'. The gender of each of the partners in each story is irrelevant, for the principles we are exploring apply equally to men and to women. For the sake of simplicity, we assume only in each case that the couple has no dependent children, for our concern here is to unpack the principles governing property division independently of other, conflating, factors.

(1) A couple divorces. Spouse A has a good job which promises to provide a high standard of living through to retirement and beyond, but Spouse B has been out of the labour force for many years, has no formal qualifications or relevant work experience, and no personal superannuation. With the break up of the marriage, Spouse B clearly faces a bleak future with no assets and only a very limited earning capacity. B's future 'needs' are clearly much greater than A's. In such a situation it seems only 'fair' to try to take these needs into account by balancing up each partner's life prospects for the future¹. Perhaps the more favoured partner should supplement the other's income with regular maintenance payments, or perhaps the Court should carve up the couple's assets in such a way that they will each be able to live at a roughly equal standard. This latter option will almost certainly mean that most of the house (and perhaps, in future, a good chunk of the superannuation entitlements too) will be given to Spouse B in order to counter-balance Spouse A's far superior earning capacity.

(2) But what if a couple divorces and it turns out that one of them has for the last twenty years been diligent while the other has been lazy and feckless? Suppose, for example, that Spouse A has been working hard to support them both and has at the same time been doing all the household chores as well! Spouse B, meanwhile, has avoided getting a job, has refused to get involved in any housework, and over twenty years has therefore contributed virtually nothing to the partnership, either directly or indirectly. In an admittedly extreme example like this, is it still 'fair' to allow Spouse B to take most of the house and much of the superannuation in order to even out their future living standards? In court, Spouse A argues for the right to retain most of the assets to which Spouse B contributed next to nothing and strongly resists any suggestion that their future incomes might be equalised through regular maintenance transfers. Far from ensuring fairness, it seems that imposition of equal outcomes would in this instance be unfair, for it would violate the entitlements which Spouse A has so

painstakingly built up, and would compound this injustice by giving resources to Spouse B who has no entitlement to them.

(3) Now assume a rather different twist. A couple divorces, and it is clear that they have both contributed through their earnings and their domestic toil to the joint wealth and assets that have been accumulated. However, unbeknown to Spouse A, who is a loving and devoted partner, Spouse B has been carrying on a series of affairs. Arriving home early from work one day, the unsuspecting Spouse A is distraught to find Spouse B in bed with the latest lover. Spouse B then makes things worse by deserting the matrimonial home, scorning all attempts at reconciliation, and starting divorce proceedings. In court, Spouse B demands half of all the assets and half of the joint future income stream, but Spouse A argues that this is grossly unfair. After all, it was B who broke their marriage up and who therefore brought about the reduced financial circumstances from which each is now suffering. How can it be fair to penalise Spouse A financially in order to support Spouse B's chosen future lifestyle when B's prospects would not have been damaged at all were it not for his/her own 'irresponsible' actions? If Spouse B brought this situation into being, why should Spouse A (who has fulfilled all the commitments of the marriage and who wants it to continue) be made to suffer? Why should the callous and reckless pursuit of self-interest on the part of Spouse B be rewarded at the expense of Spouse A's future living standards?

The point of these three little vignettes, of course, is that they demonstrate the three very different conceptions of fairness outlined earlier.

In the first case, fairness is equated with equality of outcomes – a fair divorce settlement is one in which each partner walks away with roughly equal material life chances (or at least, one where the 'future needs' of each partner are equally covered). This conception of fairness corresponds to the distributive principle of fairness supported by egalitarians.

In the second case, fairness is equated with prior entitlement – a fair divorce settlement is one in which each party takes away an amount roughly comparable to the value of what they have put into the marriage. This value will be calculated partly on the basis of their respective financial contributions, and partly in recognition of contributions in kind, such as housework. This conception of fairness corresponds to the entitlement principle – you should take out what you put in.

In the third case, fairness is equated with compensation for wrongs done or contractual promises broken. More broadly, the argument here is that individuals should not suffer for the bad behaviour of others, and that wrongs should be put right wherever possible. A fair divorce settlement is one which ensures that the wronged party does not suffer financially as a result of the marriage contract being broken by the other. This conception of fairness corresponds broadly to the just deserts principle of fairness.

These three principles of fairness all 'make sense' to us. Most of us probably share a 'gut feeling' that equality of outcomes is fair, that respecting prior entitlement is fair, and that concern for just deserts is fair. On the face of it, therefore, it seems sensible to try to ensure that all three are taken into account when couples get divorced.

Under the existing law, however, only two of these three principles are recognized. Furthermore, there are proposals for reform of the property provisions of the Family Law Act which would, if implemented, mean that only one of these principles – the egalitarian principle – would be taken into account in the future.

Problems in the current system

Earlier this year, the Attorney-General's Department put out a discussion paper on reform of the property provisions enshrined in Part VIII of the 1975 Family Law Act.

Under current arrangements, when it is determining a property settlement, the Family Court is obliged to take into account two main factors. One is the respective contributions of each spouse to the marriage; this corresponds to the principle of prior entitlement. The other is the respective future needs of the spouses; this corresponds to the broad principle of distributive justice. The Attorney-General's discussion paper refers to these as the 'retrospective' and 'prospective' components of the settlement respectively.

The discussion paper points to a number of problems with these current arrangements. Essentially, the problems revolve around (a) the constant tension between the two different principles of distributive justice (needs) and prior entitlement (contributions), and (b) the problems of applying each of these principles in practice.

The paper points out that the need to juggle both the contributions and needs elements requires that the Family Court be given considerable discretion. We pay a price for this, however. Judicial discretion reduces the predictability of the Court's judgements. This creates more grounds for grievance by one or other party when the judgement is delivered, for lack of predictability can make judgements appear capricious. Widespread use of discretion may also encourage divorcing couples to chance their arm in the Court rather than settling privately and more amicably outside it. Furthermore, the requirement that the Court take account of retrospective contributions simply encourages the parties to argue over the respective contributions they have made to the marriage, rather than accepting that it was a partnership of equals. In short, the current system seems to stir up acrimony and foster resentment.

The debate over alternatives

One alternative that the discussion paper considers is that the Court should in future simply assume equal contributions by husband and wife, unless the contrary is clearly demonstrated. Another, more radical, possibility which the paper also considers is that all property accrued over the course of a marriage should be considered communal, in which case the retrospective criterion of relative contribution would disappear altogether. Both options are tending in the same direction – namely, weakening or abandoning the prior entitlement principle (allocation on the basis of relative contributions) and emphasising solely the distributive justice principle².

This would certainly simplify matters, but would such a shift in the law be fair? If we were to move away from a concern with the contribution which each partner has made to the marriage, and to concentrate entirely on ensuring a just distribution in terms of equalised outcomes, Spouse A in our second vignette might feel understandably aggrieved. It will not be obvious to a person in Spouse A's

situation that a property settlement which gives to the other partner a major slice of the assets to which he or she has contributed nothing is a more fair and just one than a settlement which at least attempts to balance equality with prior entitlement, difficult as this may be in practice to achieve.

And what about Spouse A in our third vignette? Ever since 1975, when the current Family Law Act was introduced, a person in this situation may well have been feeling aggrieved. Spouse A believes that it is Spouse B's fault that the marriage broke up, but the Family Court has for the last quarter-century refused to take this into account at all when sharing out the property.

If we want to achieve a fair system of divorce settlements, it could be argued that all three principles of fairness should be admissible when the Family Court comes to divide up the property. Rather than reducing the criteria on which property settlements are based from two down to one, as suggested in the Attorney General's discussion paper, this would mean expanding them from two to three, for the third principle of recognising just deserts is not currently taken into account at all.

Fairness and fault

Before we take this argument further, let us clarify three points.

First, although recent complaints about the operation of the divorce law have come mainly from men, the principles of fairness which we have been exploring here are not inherently gendered, and we should not allow our prior sympathies with men's or women's issues to cloud our judgement. A woman treated badly by her husband, for example, is just as likely to feel that his bad behaviour should be taken into account when dividing up the property as is a man treated badly by his wife.

Secondly, none of these principles is a 'better' measure of fairness than any other. In everyday life, people commonly apply these principles promiscuously, arguing for one in one situation and for another in another, according to how well each principle fits their own interests at any one time. The point is that all three represent different dimensions of fairness. A settlement which only allows reference to one or two, and which precludes the possibility of appealing to the third, is almost certain to create a sense of grievance in one party or another, for fairness can always be judged on any or all of these dimensions.

Thirdly, allowing just deserts (or fault) as one of three criteria for settling property disputes in divorce settlements does not mean going back to the pre-1975 system of fault-based divorce. There is a huge difference between requiring evidence of fault as grounds for divorce, and admitting evidence of fault as one criterion of a fair property settlement once a divorce has been granted.

Critics of the current system have often pointed out that ignoring fault in divorce settlements means that the marriage contract is the *only* example in Australian civil law where somebody can make a legally-binding contract, break that contract, and suffer no penalty. Put another way, the aggrieved party – the one who fulfilled the contract but has seen it broken by the other spouse – receives no compensation, for there is no means of restitution. Indeed, the aggrieved party may even end up paying out to the offending party.

It is because of the 'unfairness' of a situation which allows people to break a contract without fear of compen-

sation that critics like Maley (1992) have argued that divorced spouses should be allowed to pursue an action for damages for breach of the marriage contract. A less cumbersome way of achieving the same end would be to allow the Family Court to take account of fault when enforcing a property settlement.

Current thinking, however, is going in precisely the opposite direction! The possibility, floated in the Attorney-General's discussion paper, that in future, divorce settlements should ignore relative contributions as well as fault and should concentrate solely on achieving distributive justice would almost certainly generate even more grievances and accusations of bias against the Family Court than the current system does. Under the present system, Spouse A in our third vignette cannot defend his/her interests by pointing to Spouse B's irresponsible behaviour, but A can at least try to ensure that his/her own contributions to the marriage are taken into account in the final settlement. If the law were to change along the lines outlined in the discussion paper, even this line of defence would be closed off.

The argument for taking fault (just deserts) into account as a third criterion for settling property claims is not without precedent in the post-1975 divorce system. It has often been argued that battered wives should be able to claim more of the matrimonial assets on divorce by virtue of the assaults they have sustained, and in a pathfinding case in 1997 it was ruled that a husband's violence could indeed be construed as a 'negative contribution' to the marriage and thus be taken into account on the retrospective criterion of 'relative benefits' (see Sheehan and Smyth, 1999, p.65).

But if fault can be admitted in one instance (spousal violence), why not in others? If a judge can use discretion to take account of one partner's violent behaviour or gambling when dividing up the assets, why not reform the law so as also to allow evidence of (for example) one partner's adultery or desertion?

Conclusion

Australians can take pride in the emphasis on fairness in the nation's culture. But fairness does not always translate into equality. Equal outcomes are one criterion of fairness, but there are others, just as important, just as defensible, just as plausible.

Fair arrangements will try, wherever possible, to take account of three different principles, not just one. The fact that the current organisation of the divorce law attracts so much criticism is largely a reflection of the

fact that the current law governing divorce settlements only takes account of two out of the three principles we have considered in this article.

Of course, the Family Court finds it difficult enough juggling just these two principles, which is why the Attorney-General is apparently thinking of 'simplifying' matters by moving away from assessment of relative contributions and concentrating in the future on some kind of application of the distributive justice principle. This would almost certainly make things easier, but it would not make them fairer.

For the Family Court to be seen to be fair, perhaps we should be thinking of adding to, rather than subtracting from, the range of considerations which may be taken into account in property settlements. Distributive justice is important, but so too is prior entitlement and demonstration of just deserts.

Notes

- 1 Distribution according to estimated future needs is not, in principle, the same thing as equal outcomes, and it is important to recognise that Australian family law currently tries to achieve the former rather than the latter. For example, when a wealthy man and his wife divorce, the court will not seek to split the property down the middle, but will rather try to estimate the wife's future needs and order a settlement accordingly. Nevertheless, the two criteria of 'need' and 'equal outcomes' are in essential respects variants of the same distributive principle of social justice (which is why Marx's famous dictum that communism would allocate resources according to need is generally seen as an egalitarian edict). In a divorce, for example, the attempt to compensate one party for their greater 'future needs' will in most cases look little different from an attempt to ensure that they each end up with roughly comparable living standards, for how else in practice are we to conclude that A's needs are greater, other than by recognising that B's potential earnings are larger? The two criteria effectively entail each other.
- 2 The paper goes on to recognise that even the single distributive justice principle can be difficult to interpret in practice. In particular, it wonders whether property settlements should in future be calculated by estimating each party's future needs (very difficult when we never know whether they will remarry, what kinds of jobs they may take in the future, and so on), or with regard to compensating one (normally the woman) for the loss of earning capacity due to the marriage (e.g. the opportunity cost of taking time out to raise children rather than staying in a career). In its response to the discussion paper, the Australian Institute of Family Studies has pointed out that in practice, many divorced couples do not have enough assets to allow wives to be compensated for loss of career earnings. There are also likely to be limits in many cases to the degree to which men's earnings are high enough to achieve this through future maintenance payments. It is one thing to establish the principle, but quite another to ensure its successful operationalisation.

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Coming up in the next Family Matters

Some of the issues taken up in this opinion column will be examined from a different perspective in the next issue of *Family Matters* where we shall publish an article based on the Australian Divorce Transitions Project – the Australian Institute of Family Studies' national survey of property and income circumstances among 513 divorced parents.

The article will examine the division of matrimonial property against the standard of 'fairness' currently enshrined in the financial provisions of the Family Law Act. Women's and men's own reports of whether property division was fair will also be examined and differences between 'legal' and 'subjective' evaluations of fairness identified. Findings from the study will then be discussed in the context of theories of distributive justice and their application to the current Government proposals for family law reform and matrimonial property division.